APPENDIX

Order of the Harlan Circuit Court

HARLAN CIRCUIT COURT

Indictment No. F1119A

THE COMMONWEALTH OF KENTUCKY,

Plaintiff,

versus

HERB CLAY, *et. al.,*

Defendants.

ORDER

The Court having considered motion of the defendant, Herb Clay, pursuant to Criminal Code section 11.42 is of the opinion that said motion should be overruled for the following reasons:

1. That the Court excluded the evidence relative to the blood sample test by virtue of the fact that no foundation was laid to establish the integrity of the sample in question,

2. That said evidence was available to the defendant on request to the Kentucky State Policemen and the defendant was derelict in failing to make an effort to obtain the evidence.

That under the Rules of Criminal Procedure in the State of Kentucky, the defendant or his counsel, or both, have the right to talk with and enquire of each of the witnesses for the Commonwealth relative to the extent of the testimony of the Commonwealth's witnesses of which the defendant did not avail himself.

At the request of the defendant, Herb Clay, the records of the Harlan Circuit Court have been ordered copied.

This the 12 day of August, 1969.

/s/ EDWARD B. HILL
Judge, Harlan Circuit Court

Opinion of the Court of Appeals of Kentucky

RENDERED: May 15, 1970

COURT OF APPEALS OF KENTUCKY

APPEAL FROM THE HARLAN CIRCUIT COURT

HONORABLE EDWARD G. HILL, *Judge*.

HERBERT CLAY,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

OPINION OF THE COURT BY COMMISSIONER WADDILL

AFFIRMING

In this RCr 11.42 post-conviction action Herbert Clay seeks to have his murder conviction vacated because of the prosecution's failure to timely disclose evidence which he contends would have supported his defense. The fatal shooting occurred on a Saturday night across the street from a place referred to as "The Club" and was witnessed by a woman who lived upstairs in a building adjoining "The Club." The victim, Nick Hatmaker, who had drunk considerable whisky, was asleep on the front seat of Clay's automobile when Clay came for it. It was Clay's contention that the gun went off accidentally when he was removing

Hatmaker from the car, but the Commonwealth's evidence was to the effect that the shooting was deliberate and occurred after Hatmaker was removed from the automobile.

After the prosecution had completed its case in chief and after Clay had testified in his defense, counsel learned of a Kentucky State Police test which had been made available to the prosecution and which disclosed that blood of the same type as the victim's had been found on the front seat of the automobile. Counsel for the accused attempted to get the test into evidence through a State Trooper but the trial court refused to admit it because it apparently concluded a proper foundation had not been laid to justify its admission. No appeal was taken from the judgment of conviction and it is now asserted that Clay's constitutional rights were violated by the failure of the prosecution to reveal the test to the defense in time for it to be used at the trial. The present appeal is from a judgment on this RCr 11.42 proceeding refusing to vacate the conviction.

Conceding arguendo that it may be a failure of due process sufficient to void a conviction if the prosecution conceals evidence material to guilt or innocence which is favorable to an accused (Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963)), when disclosure must be made necessarily would be in time for it to be of value to the accused. Hamric v. Bailey, 386 F. 2d 390 (4th Circuit 1967).

The accused had a remedy by appeal for the consideration of the questions raised here, but he did not appeal. We have consistently held that RCr 11.42 procedure is not a substitute for an appeal and does not permit a review of all trial errors. Harris v. Commonwealth, Ky., 441 S.W. 2d

143 (1969); Adams v. Commonwealth, Ky., 424 S.W. 2d 849 (1968); Connors v. Commonwealth, Ky., 400 S.W. 2d 519 (1966); Kiper v. Commonwealth, Ky., 415 S.W. 2d 92 (1967).

Consequently, we affirm the judgment denying RCr 11.42 relief.

The judgment is affirmed.

All concur except Neikirk, J., not sitting.

Mandate of the Court of Appeals of Kentucky (Judgment)

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

Spring Term—May 15, 1970

HERBERT CLAY,

vs.

COMMONWEALTH OF KENTUCKY.

Appeal from a judgment of the Harlan Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

Judge Neikirk not sitting.

A copy—Attest:

DICK VERMILLION, *C. C. A.*
By /s/ JOHN C. SCOTT, *D. C.*

Issued June 16, 1970

Excerpts From Transcript of Proceedings at Petitioner's Trial, Harlan Circuit Court, March 28, 1968

TESTIMONY OF MAE WHITUS

Direct Examination by Mr. Daniel Boone Smith:

* * * * *

[3]

Q. Tell this jury what you saw either one of these three men do or what you heard them say, starting with when Herb Clay got out there. A. When he got there, he said "Get your so and so out of my dam car". "Screwdriver" got out the back seat and stood up there beside the car, and he went around to Mr. Hatmaker and told him to get out of the car, and he said "This is my car".

Q. The white man said that? A. Yes. He said "This is my car", and Herb said "It is my car" and said "Get out of my car". When he didn't get up, Herb pulled him out.

Q. Who pulled who? A. Herb pulled the white man

[4]

out of the car.

Q. Did he get him all the way out? A. He pulled him out once and the white man went to get back in the car. He snatched him out and shoved him up against "Screwdriver" and that time he shot the man. Betty said "Herb, what did you shoot that man for".

Q. Who is Betty? A. His wife, Betty.

Q. Was she standing out there at the time? A. Yes, she was out there too.

Q. How soon after she said "Why did you shoot that man", how long was that after the shooting happened?

A. He told them all, there was a gang out there, he told them all to get back to the club and he slapped her.

Q. That is the tall colored boy over there? A. Yes. He slapped her.

Q. When Nick Hatmaker was pulled out of the car the second time, what was he trying to do or what was he doing? A. He wasn't doing nothing.

Q. Was he fighting? A. No, sir. He didn't have no knife and he didn't have no gun.

Q. Did you see his hands? A. Yes, he didn't have nothing in his hand.

Q. What did Herb Clay say to him after he slammed him up against the car and fired the shot? A. He didn't say nothing. They all left and come back across the street, and "Screwdriver" led him across the street.

Q. Led who? A. Mr. Hatmaker. He led him across the street. When he led him across the street, he stood him up there, and some of them said he stomped him, and he wanted to stomp him I know.

Q. How do you know?

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TESTIMONY OF HERB CLAY:

Direct Examination by Mr. James C. Brock:

[27]

Q. I will remind you, Mr. Clay, to speak so everybody on the jury can hear everything you say. How old were you in September of last year? A. I'm twenty-six years old.

Q. At that time where did you live? A. I lived in a place they call "Wade's Alley" over from Greene Motor Company.

Q. Here in Harlan? A. Harlan.

Q. Will you tell the jury in your own words what took place immediately before and at the time of the shooting of Nick Hatmaker? A. Yes, sir. I know what happened there because I was involved in it. First, I went into Club of Harlan. I had just got back from Manchester with Rev. Bowen squirrel hunting. I stayed in there approximately fifteen minutes. I was sitting there in the back end where they have a pool room and James Albert Jones, he came through the door as I was coming out of the pool room. He said "A man" or "Two men" or "Them men is taking your car". I said "Ah, get away, you playing", because the man plays so often. I started on out anyway. I was going out when he told me in the first place. When I got to the steps of the Club Harlan, I started down the steps. I saw lights come on the car, the motor was on. About middle way was Charles Owens, he was staggering. I don't know where he was going. I didn't ask him where he was going. We never talked before no way so I go over next to the car and get ten or fifteen feet, I said "A what you doing". No one said anything. Somebody slammed on my gas accelerator. The tires started screaming and the car began to jerk. It jerked until it killed the motor, so I went to the car and leaned in the window which was already down on the driver's side. I said, "A fellow, what you doing"? He never said a word. I said "What are you doing". He said "I'm fix-

[28]

ing to drive". I said "Well, you got the wrong car". He said "I be dammed if I got the wrong car", so I looked at the guy and the guy was fumbling with the ignition key. The car was in drive and I knew it would not start until he pushed the gear shift up to park, because it was auto-

matic shift park. He continued to fool with it. I said, "A, how much have you had to drink". He said "None of your dam business". He kept on with the key. He finally recognized the car wouldn't start. When he started to pull the gear shift, every time he pulled it down, I would push it back up. I said "No, it is best you come on out because you are drunk". He said "I ain't drunk". I said, "Oh, yes, you are". He said "No, I'm not". He pulled the gear shift down and I pushed it back up. During this time I reached and opened the door with my left hand. I said "Come on out". He said "No, I'm not coming out of here. All you niggers think somebody is crazy". I said "No, no-one is trying to hurt you, come on out, you got the wrong car". The man said "I will kill every nigger over here". The man ran his hand toward his pocket. I don't know where he was going. I caught him by the right hand. I said "No, don't do that, come on out, go on about your business or find your car". He never said a word but he did act like he was coming out of the car. I pulled the man over half way out of the car, with one foot in the corner kindly in a cramped position, one foot was on the ground. I had on a slipover sweater and a shirt and tight pair of pants which did not use a belt. I had a 45 automatic stuck in my belt. When I pulled the guy out of the car, he come on out willingly, so when I took and opened the door, I mean, reached for the keys. I was going to get the key out of the ignition switch, because I did know I left them in there, the guy got hold of the gun in my belt. When he got hold of the gun, I had to automatically turn loose of the guy to fight for the gun. When I caught hold of the gun, he fell back into the car, because he was off balance which caused me to

lean with him. When we both fell back into the car slightly, him falling and me leaning, the gun fired. I didn't know whether it shot him or shot in the seat, I do know the gun hit something soft, so I took the gun away from him, twisted it out of his hand and I laid it on top of the car. I said "Fellow, are you shot". He didn't say anything. I said "Are you shot" and he said "Hell, no, I'm not shot. Get away from here", so the man started kicking me. By this time, Mr. Owens come around. He said "Get me out of here". Mr. "Screwdriver tells me, he says "Watch out, because I'm with the guy". He caught the guy by the arm and took him on down the street. They was both staggering. It scared me because I didn't know whether the guy had got shot or what. The last thing I can think of, I took the gun off top of the car and walked to the back of the car and ejected the shell out of it because it was hung with both of us holding it, and it flipped out on the street, put the gun back in my belt and went back into Club Harlan, and fifteen or twenty minutes, maybe, before someone come in and said the man is cut. It didn't bother me none the man was cut. I knew I hadn't cut him. When I finally found out the man had been shot, I said "The man stood a good chance getting shot with my gun", so I turned to go to City Hall, which Mr. Belcher was there and he was awful nice and he brought me over to the county. I have been here ever since.

Q. Had you had anything to drink anytime that day or evening before this shooting took place? A. No, sir, I had drove all the way from Manchester, I hadn't had a drop. I drink sometimes but I had not had a drink because I was with Rev. Bowen.

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TESTIMONY OF GURNEY LUTTRELL

[37]

Direct Examination [by Mr. Brock]:

Q. State your name and rank with the state police. A. Gurney Luttrell, Post Commander, Kentucky State Police, Post 10, Harlan, Kentucky.

Q. Did you hold that official position on the 23rd and 24th of September, 1967? A. I did, sir.

Q. Did you undertake an investigation relating to the killing of one, Nick Hatmaker, on the 24th of September? A. I did, sir.

Q. What did that investigation consist of? A. It consisted of taking some samples from the seat of the automobile to determine analysis of what they were.

Q. Had you previous to that time learned of the identity of that automobile as to who the owner was? A. Yes, sir, I did.

Q. Who was the owner of that automobile? A. I was told that it was Mr. Clay's automobile.

[38]

Q. Mr. Herb Clay? A. Yes, sir.

Q. Is that the same automobile from which you took a sample of something? A. Yes, sir.

Q. What did that sample consist of? A. It was part of the seat, cotton and red stains.

Q. What did you do with that sample? A. I put it in an envelope, sealed it and gave it to Trooper Green Long in person.

Q. Did you give Trooper Green C. Long instructions as to regard of the contents of that envelope? A. Yes.

Q. What were the instructions? A. I told him what I had done and mark it and send it to the laboratory in Frankfort for analysis.

Q. Have you seen the substance that you turned over to him since that time? A. No, sir, I have not.

Q. Have you seen any report of analysis with regard to the substance in the envelope? A. I have seen a report but I have not read it.

Q. Do you know where that report now is kept? A. Yes, sir.

Q. Where? A. It is in a folder with the case report.

Q. Is that case report of the homicide of Nick Hatmaker? A. Yes, sir, it is.

(Witness excused.)

[39]

TESTIMONY OF GREEN C. LONG

Direct Examination by Mr. James C. Brock:

Q. What is your name? A. Trooper Green C. Long.

Q. Are you Trooper with the Kentucky State Police? A. That is correct.

Q. Were you on the 23rd and 24th of September, 1967? A. I was.

Q. Did you have any connection officially with the investigation of the homicide of Nick Hatmaker? A. Yes, sir, I did.

Q. What did that consist of? A. That consisted of a sample for analysis I received from Sergeant Luttrell. I sent that to the laboratory, interviewing different witnesses and making a record of my findings.

Q. Did you compose a file for the records of the Kentucky State Police Post 10? A. I did.

Q. As a part of that file, do you have a package which purports to contain the sample that you sent to the State Police Laboratory? A. Yes, sir.

Q. Did you receive a report from that laboratory accompanied with the sample returned to you? A. Yes, sir.
Q. Will you tell the Court what that report disclosed?

Commonwealth Objects: Objection sustained, to every bit of it. This is all avowal.

Mr. Daniel Boone Smith: Move to exclude.

Court: Sustained. Go ahead.

A. The report is dated, October 30, 1967, to Superinten-
[40]
dent, Kentucky State Police, Frankfort, Kentucky. Attention, Captain James W. Hughes, Commander of Bureau of Investigation, states: This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter, and that the laboratory report will be used for official purposes only, relating to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for use of the laboratory report in connection with a civil proceeding. Signed by J. Edgar Hoover. In reference to Herbert Clay, suspect, Francis Lee Hatmaker, victim, murder. Your file 10-8343. F.B.I. File No. 95-10896. Laboratory No. PC-AL976LG. Examination requested by addressee. Reference letter 10/10/67. Examination requested, chemical analysis, specimens QI, portion of seat, K-1, blood from victim. Results of examination: Grouping test conducted on specimen KI, discloses that the victim belonged to blood group "A". Group "A", human blood was identified on specimen Q-I. The submitted evidence is being returned to you under separate cover by registered mail. This is contents of the report we received.

Mr. Daniel Boone Smith: At this point, I move to exclude the report and all evidence connected with it.

The Court: Sustained the objection.

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CLOSING ARGUMENTS

[48]

Argument of the case was made to the jury on behalf of the defendants by Mr. James C. Brock.

Argument of the case on behalf of the Commonwealth was made to the jury by Mr. Daniel Boone Smith.

Objections were made by Mr. James C. Brock to the following statements made by Mr. Daniel Boone Smith in his argument to the jury.

"Human life in some countries is worthless in some countries. Right today, American boys are being killed over seas."

Objection: Objection overruled.

"I think one of the world's tragedies is for a man to go to Saipan in the defense of his country, lose the muscles of his leg, lose most of his strength, and then come home and let a six foot, three, colored man jerk him out of an automobile, just back from a trip with Rev. Bowen, with a cocked 45 automatic under his belt and with a good reputation to kill a man under those circumstances.

Objection: Objection overruled.